IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

APPEAL NO.889 OF 2006
IN
CHAMBER SUMMONS NO.54 OF 2006
IN
TESTAMENTARY SUIT NO.33 OF 1986
IN
TESTAMENTARY PETITION NO.613 OF 1986

Chandrabai K. Bhoir & Ors. ..Appellants.
Vs.
Krishna Arjun Bhoir & anr. ..Respondents.

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Shri S.R. Mishra for the Appellants.
Ms. Rajani Iyer, Senior Advocate with Shri Y.V. Divekar with Shri U.M. Mahajan with Mrs. Gitanjali Prabhu i/b Divekar & Co. for Respondent No.1.

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CORAM: **R. M. S. KHANDEPARKAR, &**
DR. D.Y. CHANDRACHUD, JJ.

5th February, 2007.

P.C. :

1. Heard.

2. The present Appeal arises from the order dated 28th September, 2006 passed in Chamber Summons 54 of 2006 in Testamentary Suit 33 of 1986. The challenge to the impugned order is two fold; firstly that the earlier Chamber Summons was withdrawn without any liberty to initiate proceedings in that regard

and secondly, that the impugned order virtually transgressed the limits of the jurisdiction of the Court under Section 302 of the Indian Succession Act, 1925 in testamentary proceedings.

3. As far as the first ground of challenge is concerned, the learned senior counsel for the Respondents has placed on record a copy of the order dated 17th January, 2007 passed in Chamber Summons 1656 of 2004 in the said Testamentary Suit. By the said order the Learned Single Judge has clarified that while withdrawing the earlier Chamber Summons, leave was granted to take out fresh Chamber Summons. Accordingly after withdrawing the earlier Chamber Summons the present Chamber Summons was taken out and same was disposed of by the impugned order dated 28th September, 2006. Hence, there is absolutely no substance in the first ground of challenge to the impugned order.

4. As regards the second ground of challenge, the learned advocate for the Appellants drawing our attention to the order dated 11th February, 1993 which was passed in the said Testamentary Suit submitted that the terms of the agreement clearly provided that payment of the entire dues was to be made

within 24 months failing which the agreement would come to an end, and in fact on account of failure to perform the obligation regarding the said payment in terms of the said agreement, the Appellants had served a notice dated 26th November, 1998 revoking the said agreement. The agreement having been terminated, the Respondents could not have availed any benefit under Clause 5 of the said agreement and yet the impugned order is solely based on the said Clause 5 of the agreement. In any case according to the learned advocate, the directions which can be issued in exercise of the powers under Section 302 of the said Act are necessarily in relation to the administration of the estate, however, the directions which have been issued under the impugned order are against the persons who are not even the legal representatives of the testator. The impugned order is clearly in excess of exercise of the powers under Section 302 of the said Act. The learned advocate appearing for the Respondents on the other hand drawing our attention to Clause 2 of the Consent Terms has submitted that the Learned Judge dealing with the testamentary jurisdiction is empowered to issue directions in relation to administration of the estate in terms of the will and as the terms of the will were altered in terms of the agreement duly

certified and having obtained legal sanctity on account of the said consent order in that regard, the directions which have been issued based on Clause 5 of the Consent Terms are in fact in accordance with the terms of the modified will which has been duly approved by the consent order dated 11th February, 1993 and by no stretch of imagination can be said to be in transgression of the limits of powers prescribed under Section 302 of the said Act. The attention was also drawn to the contents of the notice dated 26th November, 1998 while contending that the said notice nowhere discloses revocation of the agreement, but it merely called upon the Respondents to revoke the agreement.

5. A perusal of the impugned order undoubtedly discloses a direction in terms of Clause 5 of the agreement dated 2nd December, 1992. Clause 5 of the said agreement reads thus :

> "The party of the order part hereby agrees to pay the said amount as stated above to the Party of the first part and further agrees to pay interest at the rate of 18% p. a. on such amount which not paid on due date from due date till payment thereof and till that date the said unpaid amount alongwith accrued interest shall constitute a charge over the property mentioned herein."

The said agreement forms part of the Consent Terms which were duly approved by the Court on 11th February, 1993 in the said

Testamentary Suit and Clause 2 of the said Consent Terms reads thus :

> "The parties agree that even though the Probate will be granted to the Petitioner unconditionally the terms of the Will, will stand changed and/or altered on terms of agreement annexure "A" hereto."

A plain reading of said Clause 2 of the Consent Terms arrived at with Clause 5 of the agreement and the order dated 11th February, 1993 discloses that the Learned Single Judge dealing with the Testamentary Suit while disposing of the dispute between the parties on the basis of the Consent Terms arrived at between the parties had approved the modified terms of the will whereby apart from the approved terms in relation to the mode of payment of the amount by the developer, the Court had also issued directions in the form of creation of charge over the property in case of delay of payment of the said amount by the developer with further directions about the liability to pay interest at the rate of 18% per annum on such delayed payment. Section 302 of the Said Act clearly provides that where probate or letters of administration in respect of any estate has or have been granted under the said Act, the High Court may, on application made to it, give to the executor or administrator any general or special directions in regard to the

estate or in regard to the administration thereof. In the impugned order accordingly in exercise of the powers under the said Act, the Learned Single Judge has issued directions for appropriate compliance of earlier directions issued in terms of the consent order dated 11th February, 1993 and while issuing those directions it has been specifically held thus :

> "(iv) In case the respondents institute proceedings in appropriate Court within a period of six months and secure appropriate orders, the disposal of the amount shall be governed by the order that may be passed by the competent Court."

6. Apparently the Learned Single Judge has left open for the aggrieved party to take out proceedings in case if so desire to get a final adjudication on the issue regarding the rights and liabilities under the said consent order.

7. The learned advocate for the Respondents, however, is justified in submitting that the observations made in relation to the termination of the agreement are to be construed as prima facie observations and this fact is also apparent from the directions in clause (iv) quoted above. The issue as to whether the agreement stands terminated or not is kept open for being considered in

appropriate proceedings if the parties so desire to have an adjudication in that regard. That being so, it would be too premature for this Court to pronounce any opinion on the said aspect.

8. In the facts and circumstances stated above therefore, we do not find any case being made out for interference in the impugned order. The Appeal is accordingly rejected. There shall be no order as to costs.

(R. M. S. KHANDEPARKAR, J.)

(DR. D.Y. CHANDRACHUD, J.)